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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID GENE SMITH,

Defendant and Appellant.

E064022

(Super.Ct.No. FVI1300638)

OPINION

APPEAL from the Superior Court of San Bernardino County. John M.

Tomberlin, Judge. Affirmed with directions.

Richard Power, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina, Seth Friedman and Meagan J. Beale, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant and appellant David Gene Smith guilty of (1) first degree burglary (Pen. Code, § 459);¹ (2) robbery (§ 211); and (3) assault (§ 240). The jury found true the allegation that the victim was present during the burglary. (§ 667.5, subd. (c)(21).) Defendant admitted suffering (1) a prior strike conviction (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)); (2) a prior serious felony conviction (§ 667, subd. (a)(1)); and (3) two prior convictions for which he served prison terms (§ 667.5, subd. (b)). The trial court sentenced defendant to prison for a term of 15 years, and to jail for a concurrent term of 180 days.

Defendant contends he was denied a fair trial due to the introduction of improper character testimony. Defendant also asserts his abstract of judgment needs to be corrected. The People agree with defendant's abstract of judgment contention. We affirm the judgment with directions.

FACTUAL AND PROCEDURAL HISTORY

A. CRIMES

On February 28, 2013, at approximately 1:00 a.m., the victim was at home sleeping. The victim awoke upon hearing defendant, who was outside, call the victim's name. The victim recognized defendant's voice, so he opened the door. Defendant was at the door with Dan Lawson (Lawson). The victim knew defendant but did not know Lawson.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

Immediately after the victim opened the door, he was struck and fell down.

Defendant and Lawson entered the victim's house. Defendant and Lawson continued to strike the victim. Defendant and Lawson asked where the victim kept his money and gold, and asked what medications the victim had. The victim's neighbor's dogs were barking. The neighbor asked, "[W]hat's going on there?" The victim said, "[T]hey are killing me." The neighbor called police.

Defendant and Lawson took an antique desk, a wicker chair, a knife, a lamp, and the victim's Klonopin, which is a medication. The furniture was placed in the back of a pickup truck. While defendant and Lawson were leaving the victim's property, the truck hit a tree and became lodged on the tree stump. Defendant and Lawson fled, leaving the truck lodged on the stump. The victim told law enforcement that defendant attacked him.

The pickup truck was registered to Lawson. San Bernardino County Sheriff's Deputy Womelsdorf went to Lawson's home but Lawson was not there. Based on the information the victim gave the deputy regarding defendant's name and approximate age, the deputy found defendant's address. The deputy went to defendant's home and spoke to defendant. The victim identified defendant and Lawson in six-pack photographic line-ups.

B. TRIAL

During the prosecutor's direct examination of the victim, the following exchange occurred:

“[Prosecutor]: Now, you indicated that you recognized an individual by the name of [defendant]; is that correct?

“[Victim]: Yes.

“[Prosecutor]: How did you recognize [defendant]?

“[Victim]: He had been to my house before.

“[Prosecutor]: Why had he been to your house before?

“[Defendant’s trial attorney]: Object. Irrelevant.

“The Court: Overruled.

“[Victim]: He was involved with some people who were using drugs and—

“[Defendant’s trial attorney]: Objection. This is multiple hearsay.

“The Court: I’m going to sustain the objection.

“[Prosecutor]: Did you know defendant—

“[Defendant’s trial attorney]: Motion to strike the partial answer.

“The Court: Stricken.

“[Prosecutor]: — from multiple prior contacts?

“[Victim]: Yes.”

After the foregoing exchange, outside the presence of the jury, the prosecutor asked the trial court if he could ask the victim “if [the victim has] engaged [in] business transactions with [defendant], if that is how he personally knows him. And it specifically relates to [the] purchase of drugs. The reason I want to ask that, it goes to how he’s able to know this person and what the nature of the relationship is.” The trial

court found the question would illicit collateral information and excluded it under Evidence Code section 352.

After the lunch recess, outside the presence of the jury, the trial court said, “This is a can of worms as far as I’m concerned. I was not aware of any of this at the beginning. If we had talked about it in some way, it might have been a good idea. [¶] There was a surprise to me when there was a statement made by [the victim] during the direct examination, something about drugs was talked about. [Defendant’s trial attorney] made a motion, gave an objection at that point. He called it a hearsay. I wasn’t thinking hearsay. I was thinking relevance when I sustained that objection. But I sustained a motion. He made a motion to strike I granted. The jury heard that, but I will tell them to disregard anything that is stricken from the record.”

As the conversation continued, the trial court asked if there was evidence of the victim selling drugs. Lawson’s attorney, reading from a police report, said, “This is the victim here[:] He opened the door and recognized [defendant] who he used to know as a person who would come by and he would buy drugs from him.” The trial court said the pronouns in the police report were unclear, so one could not know if defendant bought drugs from the victim, or if the victim bought drugs from defendant.

The trial court ruled, under Evidence Code section 352, that evidence about the victim’s possible drug use and possibly being under the influence of methamphetamine was excluded. The trial court also ruled that the prosecutor could not ask the victim to clarify how many times he had contact with defendant. The trial court instructed the jury at the beginning and end of the trial to disregard stricken testimony.

DISCUSSION

A. CHARACTER EVIDENCE

Defendant contends his right to a fair trial was violated by the introduction of improper character testimony, specifically the victim's stricken statement, "He was involved with some people who were using drugs and—"

Evidence of character traits "is inadmissible when offered to prove [the person's] conduct on a specified occasion." (Evid. Code, § 1101, subd. (a).) However, evidence that a person committed a crime or other act is admissible "when relevant to prove some fact . . . other than his or her disposition to commit such an act." (Evid. Code, § 1101, subd. (b).)

The foregoing rule—not allowing evidence of a character trait to be used to prove the person's conduct on a specified occasion—was created due to concerns that character evidence may "weigh too much with the jury and . . . overpersuade them as to prejudice one with a bad general record and deny him a fair opportunity to defend against a particular charge." (*Michelson v. U.S.* (1948) 335 U.S. 469, 476.) When an evidentiary error occurs, due process is violated only when that error makes the trial fundamentally unfair. (*People v. Partida* (2005) 37 Cal.4th 428, 439.) Thus, if evidence is probative only of a defendant's poor character, then constitutional error can result if that evidence renders defendant's trial fundamentally unfair. (*People v. Fitch* (1997) 55 Cal.App.4th 172, 180-181 discussing *McKinney v. Rees* (9th Cir. 1993) F.2d 1378, 1384-1386.) Because defendant is asserting his constitutional right to a fair trial

was violated, we will apply the de novo standard of review. (*People v. Herrera* (2016) 247 Cal.App.4th 467, 475.)

At the time the testimony at issue was elicited, the prosecutor was asking the victim how he knew defendant. The manner in which the victim knew defendant was relevant because the victim had to identify defendant. The victim said he opened the door and was immediately punched, fell down, lost his glasses, got back up, and then continued to be hit throughout the incident. The jury could reasonably question how the victim, who fell down, lost his glasses, and was repeatedly struck, could be so certain in his identification of defendant.

The victim said he knew defendant because defendant had previously been at the victim's house. The next logical question was the question asked by the prosecutor—why had defendant been at the victim's house. The information was important because if defendant had momentarily been at the victim's house to see a person other than the victim, then the victim's identification of defendant might be less reliable. However, if defendant had previously been at the victim's house to see the victim, and their interaction lasted for a significant period of time, then it would be more reasonable to conclude the victim could accurately identify defendant.

The point being that the prosecutor's question was not designed to establish that, due to defendant associating with people who use drugs, defendant is guilty in the instant case. Rather, the question was designed to show that, due to prior business transactions between defendant and the victim, the victim could accurately identify defendant despite being knocked down and losing his glasses. Therefore, the testimony

was not inadmissible character evidence (Evid. Code, § 1101, subd. (b)), and defendant's right to a fair trial was not violated by the stricken evidence. (See *People v. Farnam* (2002) 28 Cal.4th 107, 163 [when character evidence is relevant to an issue other than character, there is no error].)

In defendant's Appellant's Opening Brief, he asserts, "Identification was at issue in the present case," and therefore the stricken testimony was prejudicial because there was little other evidence identifying defendant and this evidence may have caused "the jurors [to] believ[e] the identification." In defendant's Appellant's Reply Brief, he argues that the stricken testimony could not "be used to prove identity." As we have explained *ante*, the evidence was helpful to understanding how the victim was able to identify defendant. However, it is important to remember that the jury did not rely on this evidence. The trial court struck the statement and instructed the jury to disregard the statement. In the absence of a contrary showing, we presume the jury followed this instruction and disregarded the evidence. (*People v. Stanley* (1995) 10 Cal.4th 764, 837.) Thus, we reiterate, the stricken statement was not used by the jury.

Defendant contends the prosecutor committed misconduct when asking why defendant was at the victim's house on prior occasions because the prosecutor knew, from the police report, that information about drug transactions would be introduced. "As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety." (*People v. Hill* (1998) 17 Cal.4th 800, 820.)

In the trial court, defendant did not object on the basis of prosecutorial misconduct. Rather, he objected on the bases of relevance and hearsay. Because defendant did not raise a prosecutorial misconduct objection, the issue is forfeited. (See *People v. Dykes* (2009) 46 Cal.4th 731, 766 [relevancy objection does not preserve misconduct issue for appeal].)

The exception to the foregoing general rule is that an objection will not be required when either an objection or request for admonition would be futile. (*People v. Hill, supra*, 17 Cal.4th at p. 820.) The trial court initially overruled defendant's objection, but upon hearing a portion of the victim's answer, the trial court sustained defendant's second objection, struck the testimony following defendant's request, and instructed the jury to disregard the stricken testimony. These actions by the trial court support the conclusion that if defendant had objected on prosecutorial misconduct grounds, the objection would not have been futile because the trial court was open to the prospect of sustaining defendant's objections and admonishing the jury, as evinced by the trial court taking those exact actions. Thus, we conclude the prosecutorial misconduct issue is forfeited and the exception does not apply.

B. ABSTRACT OF JUDGMENT

1. *PROCEDURAL HISTORY*

The trial court designated the robbery (§ 211) (count 2) as the principal count. The trial court imposed a four-year sentence for the robbery conviction, doubled to eight years due to defendant's prior strike conviction. The trial court imposed a consecutive five-year sentence for defendant's prior serious felony conviction (§ 667, subd. (a)(1)),

which brought defendant's sentence to 13 years. The trial court then imposed consecutive one-year terms for each of defendant's two prison priors (§ 667.5, subd. (b)), which created a total prison term of 15 years.

2. ANALYSIS

Defendant contends there are various errors in his abstract of judgment that need to be corrected. The People concede defendant's contention is correct.

First, defendant asserts the abstract is incorrect in that it reflects the five-year prison term is for the finding that the victim was present during the burglary (§ 667.5, subd. (c)(21)). The abstract must be corrected to reflect the five-year enhancement is for defendant's prior serious felony conviction (§ 667, subd. (a)(1)).

Second, defendant asserts the five-year enhancement should not be listed in the section for enhancements tied to a specific count, which is where the incorrect section 667.5, subdivision (c)(21) sentence is currently listed. Rather, the corrected section 667, subdivision (a)(1), five-year sentence should be listed in the section for enhancements related to prior convictions. Defendant is correct that the five-year enhancement (§ 667, subd. (a)(1)) should be listed in the section for enhancements related to prior convictions.

Third, defendant contends the abstract is incorrect in that it reflects a one-year enhancement was imposed for the prior serious felony (§ 667, subd. (a)(1)), and omits the second one-year prison prior enhancement (§ 667.5, subd. (b)). Defendant is correct. In the section of the abstract of judgment that concerns enhancements for prior convictions, there should be three terms listed: (1) one year for the first prison prior

(§ 667.5, subd. (b)); (2) one year for the second prison prior (§ 667.5, subd. (b)); and (3) five years for the prior serious felony conviction (§ 667, subd. (a)(1)).

DISPOSITION

The trial court is directed to issue an amended abstract of judgment with the following amendments: (1) in the section for enhancements tied to specific counts, delete the five-year prison term and the reference to section 667.5, subdivision (c)(21); (2) in the section for enhancements related to prior convictions, (a) change the one-year term for the prior serious felony (§ 667, subd. (a)(1)) to a five-year term, and (b) add a second one-year term for the second prison prior (§ 667.5, subd. (b)). The trial court is further directed to forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. (§§ 1213, 1216.) In all other respects, the judgment is affirmed.

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MILLER
J.

We concur:

RAMIREZ
P. J.

SLOUGH
J.